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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 197____

LINDEN ODELL KAISER

Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Attorneys for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 197__

NO._____

LINDEN ODELL KAISER, Petitioner

v. UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINDEN ODELL KAISER, your Petitioner and ppellant, prays that a writ of certiorari ssue to review the judgment of the United tates Court of Appeals for the Seventh Circuit, ntered in the above-entitled cause on April 30, 973, which judgment affirmed Petitioner's con- iction in the United States District Court for he Eastern District of Illinois on three counts f an indictment charging him with (1) theft rom an interstate shipment and aiding and betting the same (18 U.S.C. §§ 659, 2), (2) eceiving and concealing a stolen motor vehicle nd aiding and abetting same (18 U.S.C. §§ 2313, 2) nd (3) conspiracy to commit theft from an nterstate shipment (U.S.C. §§ 371).

OPINIONS BELOW

There was no formal opinion in the United States District Court for the Eastern District of Illinois wherein the Petitioner was convicted. The opinion of the Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced in Appendix A to this Petition. Petitioner timely filed a motion for rehearing in the appeals court, and said motion for rehearing was denied by an order dated May 31, 1973. Said order is reproduced in Appendix A to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming Defendant's conviction and ten year sentence as to Count (1), five year sentence as to Count (2), and five year sentence to Count (3) sentences to run concurrently in the United States District Court for the Eastern District of Illinois was entered on April 30, 1973. As aforesaid, a timely filed petition for rehearing was denied

by order of the Court of Appeals, dated May 31, 1973. The jurisdiction of the Supreme Court is invoked under 28 U.S. Code, 1254(1) and under Rule 19, Supreme Court Rules, because the opinion of the Court of Appeals decided an important constitutional issue in a way in conflict with applicable decisions of the Supreme Court of the United States, and the appeals court decision conflicts with decisions of the courts of appeals for other circuits, particularly decisions from the Second, Third and Fifth Circuits.

QUESTIONS PRESENTED

Whether the trial court erred in overruling the Petitioner's motion for mistrial duly made, directed to inadmissible and highly prejudicial testimony given by a government witness in answer to a question propounded to him by the United States Attorney, wherein the jury was informed that the Petitioner had a prior felony record, such evidence being

admissible for impeachment purposes only and for that purpose only if the Petitioner testified in his own behalf, which Petitioner did not do; and whether the Court of Appeals committed error requiring reversal in affirming the action of the trial judge.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The following Constitutional Amendment, Statutes and Rules are material to this appeal.

Fifth Amendment U.S.C.A. Const. Amend. 5, p 4

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 52(a) and (b), 18 U.S.C.A. P. 399, Federal Rules of Criminal Procedure, is quoted verbatim, to-wit:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Section 3481, Title 18, U.S.C.A. P. 488 pertaining to the competency of the accused to be a witness in his own behalf and his right to

elect not to testify reads as follows, to-wit:

> §3481. Competency of accused
>
> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession, or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him.

STATEMENT OF THE CASE

That, in the trial of this case, during the direct testimony of John Bruce Gould, a government witness, said witness in answer to a question propounded to him by the Prosecutor, made known to the jury that the Defendant and Petitioner herein, Linden Odell Kaiser, had a prior felony criminal record by referring to him in language that included the word "con", making it unmistakably clear that the Petitioner had a prior felony record. The entire sequence

of the testimony appears on pages 171 and 172 of the transcript and is quoted verbatim as follows:

Q: When you first met Mr. Kaiser, Mr. Gould, did he ask you if you had served any time?

A: Not in so many words. It's--it's something that would be extremely hard for the average layman to understand, a person that has been in the penitentiary--

MR. MAYER: Well, I am going to object, Your Honor, to -- that isn't answering the question.

WITNESS: I was trying to, sir, in my own way.

MR. HESS: Well, perhaps, counsel, if I rephrased it, we can build up to it. (To Witness) How did the -- the subject of your record come up in the conversation?

A. I -- in talking to Mr. Kaiser, there are certain inflections, a certain phraseology, vernacular, words that

a con would use that is understandable by another con. It's--it's a way that you --

MR. BREWER: Now, I'm going to object, Your Honor.

THE COURT: Sustained. The last portion will be stricken, the jury instructed to disregard same.

MR. BREWER: Ask the Court for a mistrial.

THE COURT: Overruled.

MR. BREWER: Exception.

THE COURT: Proceed.

It is significant that the error complained of occurred during direct examination of a government witness by the government attorney, and the Defendant Kaiser nor any of the other Defendants can be charged with inviting the error. At no time during the trial did the Defendant Kaiser take the witness stand on his own behalf. The Government did not contend during the trial that evidence of Kaiser's prior criminal record was admissible for any

purpose under any theory. No exceptions exist in this case to the general rule that evidence of a prior criminal record is not admissible against one who does not testify in his own behalf.

The inadmissibility of Kaiser's prior criminal record is not in issue in this appeal, for the trial judge appreciated its prejudicial and inflammatory nature and sustained objections made thereto and instructed the jury to disregard same. It is the Petitioner's contention that the extreme and inflammatory nature of the improper testimony was such that it could not be cured by the Court's instructions, and this position is strongly supported by numerous well-thought-out and reasoned appellate decisions, including decisions of the Supreme Court.

REASONS FOR GRANTING THE WRIT

In Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959) this court established a building principle

for the type of error complained of in this application for certiorari and reversed a conviction on the ground that jurors read a newspaper account of acts and the reputation of the accused. As in Kaiser's case, the accused in Marshall never took the stand. The trial judge, when he learned what had occurred, summoned the jurors into his chambers and, one by one, inquired of them whether they had seen the articles. The trial judge was told by each juror who had seen the articles that he would not be influenced by the news articles, that he could decide the case on only the evidence of record, and that he felt no prejudice against Petitioner as a result of the articles. The trial judge felt there was no prejudice and denied a motion for mistrial. The Supreme Court noted that the articles mentioned prior convictions that the trial court had found to be prejudicial and inadmissible and commented as follows:

"The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the Prosecution's evidence. (Cf. Michelson v. United States 335 U.S. 469, 475, 93 L. Ed. 168, 173, 69 S. Ct. 213.)"

The court in Marshall attempted to make no subtle distinction as to the source (whether from newsprint or witness stand) of the cancer affecting substantial rights, and the various Federal Circuits should follow this court's exemplary precedent. The Seventh Circuit in this case has failed to follow the principles and guidelines set forth in the Marshall decision, and the opinion of the Seventh Circuit herein sought to be reversed erodes away at the foundation and quality of the administration of criminal justice in our land because the error complained of effectively destroyed Petitioner's Fifth Amendment right.

The failure of an appellate court to reverse a conviction in the face of an error of such fundamental magnitude creates an atmosphere that suggests to prosecutors that our appellate courts will tolerate and allow the improper admission of evidence of an accused's prior criminal record, and the opinion even encourages the practice of admitting such evidence, because the court of appeals by its refusal to reverse has chosen to salvage an improper conviction which is at least partially based upon admittedly inadmissible and highly prejudicial evidence by tenaciously clinging to the legal fiction that so grave an error can be cured by instruction to the jury, when the fact is that such an instruction simply cannot cure such an error. Opinions such as the one here sought to be reversed will make federal criminal trials vulnerable to a Pandora's box full of such errors in the future.

The emphasis in the opinion of the court of appeals regarding whether or not the

complained of testimony was intentionally or unintentionally elicited by the government seems completely misplaced. The question is whether or not prejudicial error occurred and whether the Petitioner was irreparably harmed or potentially could have been so harmed. In Marshall it was not contended by the Petitioner-Appellant that the government allowed the newspaper articles in the jury room intentionally.

The occurrence in that case was undoubtedly against the government's express desires, but the newspaper article got into the jury room, error occurred, prejudice resulted, and reversal followed. This court's Marshall decision did not rest on any theory that gave weight to whether or not the error was caused by conscious action on the part of the government. Such a test is completely unrealistic, for it is subjective in nature and the Petitioner's burden of proof would be next to impossible.

The opinion sought to be reversed is in direct conflict with decisions from the Second,

Third and Fifth Circuits. The opinions from the various circuits demonstrate an obvious conflict in basic philosophy and approach directed to the particular constitutional issue involved; and these differences cannot be rationally explained away through a case-by-case analysis. Petitioner's attorney feels unquestionably that there exists a conflict of substance between the various circuits that should be resolved by the United States Supreme Court.

Petitioner's attorney on appeal cannot understand how the Court of Appeals could conclude that McIntosh v. United States, 309 F. 2d 222 (D.C. Cir. 1962) and United States v. Stromberg 268 F. 2d 256 (2nd Cir., 1959) are on point and provide more helpful guidance than cases much more on point, such as Marshall v. United States, 360 U.S. 310; United States v. Rinaldi, 301 F. 2d 576, (2nd Cir. 1962); Helton v. United States, 221 F. 2d 338 (5th Cir., 1955); United

States v. Clarke, 343 F. 2d 90 (3rd Cir., 1965) and Odom v. United States, 377 F. 2d 853 (5th Cir., 1967). The Court of Appeals, in its opinion dated April 30, 1973, stated, after referring to McIntosh and Stromberg as being authoritative that, "in each of these cases there were references to prior convictions of defendants." This statement is not factual and leads me to believe that the cases before the Court were not carefully analyzed.

In the Stromberg case a witness on cross-examination referred to the Defendant as being "in jail". In the McIntosh case a government witness referred to another person who had questioned the Petitioner after his arrest as "the parole officer". In McIntosh, appellee admits in its brief that the witness did not explicitely state that it was the Defendant's parole officer who was the interrogator. The alleged errors in McIntosh and Stromberg are hardly comparacle to the error that occurred in this case.

In United States v. Rinaldi, 301 F 2d 576 (2nd Cir., 1962), a case very much on point, the Defendant, as in this case, did not take the witness stand; his credibility, therefore, is not open to attack. See United States v. Tomaiolo, 249 F. 2d 683 (2nd Cir., 1958). Rinaldi's wife testified on direct examination regarding his whereabouts on a certain date in an apparent effort to contradict government testimony as to a conference (relative to conspiracy count) he had reportedly attended on that date. On cross-examination, the following occurred, to-wit:

Q: Has your husband ever been convicted of a crime?

A: Yes.

Defendant's attorney immediately moved for a mistrial. The Court denied the motion for mistrial and instructed the jury that they must not consider the question or answer. The Court's instruction was lengthy and thorough and appears on page 578 of the opinion. The opinion of the

Second Circuit, in part, reads as follows, to-wit:

"Improper introduction of evidence of a Defendant's past criminal record is ground for a new trial. Cautionary instructions will not cure the error." Marshall v. United States 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959); United States v. Tomaiolo, 249 F., 2d 683 (2nd Cir., 1958); United States v. Jacangelo, 281 F. 2d 574 (3rd Cir., 1960); Helton v. United States, 221 F. 2d 338 (5 Cir., 1955) The conviction of Rinaldi must, therefore, be reversed and his case remanded for a new trial."

The Second Circuit referred to the inadmissible evidence concerning Rinaldi having been convicted of a crime as constituting "plain error" stating as follows, to-wit:

"Certainly there is here plain error affecting substantial rights of Defendant's which the Court is required to notice ... Rule 52(b), 18 U.S.C.A.,

Federal Rules of Criminal Procedure ... reversed and remanded as to Defendant Rinaldi."

In the Rinaldi decision the inadmissible testimony that resulted in reversal was that the accused had been convicted of a crime; it was not established whether that crime was a misdemeanor or a felony. The crime could have been serious or extremely minor. Kaiser's appeal is much stronger than Rinaldi in calling for reversal, because the word "con" as used by the government's witness implied not only conviction of "a crime", but it connoted conviction and incarceration in a penitentiary for a particular kind of crime, a felony. One who has been convicted of a misdemeanor is not in common parlance referred to or thought of as being a "con" or convict. Only one who has been convicted of a felony and who additionally has been incarcerated in a penitentiary as a result of such conviction is ordinarily thought of as being a "con" or "convict". The complained

of error in Kaiser's appeal was far more prejudicial than the error that resulted in the reversal of Rinaldi's conviction.

The Petitioner further relies on Helton v. United States 221 F. 2d 338 (5th Cir., 1955). In Helton, as in this case, the Defendant did not take the witness stand. During the trial, testimony was heard and received by the jury that the Defendant had admitted to a federal agent that "he had been smoking marijuana intermittently very seldom for the past four or five years". A timely objection was made by defense counsel, and the Court sustained the objection but failed to expressly instruct the jury to disregard the improper testimony. Helton's attorney, not being satisfied that the Court's action could blot out from the minds of the jurors improperly introduced evidence respecting an extraneous violation of the law, moved for a mistrial, which was denied. The Fifth Circuit, even in the absence of a specific instruction to the jury to disregard

the improper testimony, nevertheless reversed the conviction. It is significant that in Helton the Court made the following comment relevant to the issue of improper admission of evidence of prior offenses:

"...It is true that the evidence of guilt here is overwhelming and that, on a second trial, with the improper evidence excluded, the result may be the same. It is also true that under Rule 52(a) Federal Rules of Criminal Procedure, 18 U.S.C., we must disregard harmless error. But Mr. Justice Harlan in Boyd v. United States, supra, 142 U.S. at page 458, 12 S. Ct., at page 295, must have had a case like this in mind when he wrote, 'However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged'. Reversed and remanded."

In the United States v. Clarke, 343 F. 2nd 90 (3rd Cir., 1965), the defendants were found guilty of conspiring to violate the Federal Narcotics Laws. The appeal was based primarily on the testimony of a government witness, a federal narcotics agent. On direct examination the federal narcotics agent testified that the defendant had told him that he had furnished an amount of cocaine to a fellow in New York. A timely objection was made, and the jury was instructed to disregard the information they had just heard. The Defendant moved for a mistrial, and his motion was denied. It was the Defendant's contention that, since their defense was entrapment, testimony that the Defendant had admitted to a federal agent that he had, prior to the unlawful sales charged in the indictment, furnished a considerable amount of cocaine to a fellow in New York," could have so prejudiced the jury that no instruction to disregard it could cure the error. The government contended that prompt instruction to disregard the improper testimony removed any

ssible prejudice. The Third Circuit ruled at the objected to testimony was, "... of ch critical and grave proportions as to rretrievably scorch itself into the conscious d sub-conscious minds of the jury. The most liant effort on the part of a conscientious ror to obey the trial judge's admission to isregard the testimony could only be an xercise in futility ..."

The judgment of conviction in Clarke was eversed, and the case remanded to the District ourt with the directions to grant a new trial. n the Clarke case the following cases were ited by the Court as authoritative:

Throckmorton v. Holt, 180 U.S. 552, 21 S. Ct. 474, 45 L. Ed. 663 (1901);

Mora v. United States, 190 F. 2nd 749 (5th Cir., 1951);

Holt v. United States 94 F. 2nd 90 (10th Cir., 1937);

Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

In Odom v. United States 377 F. 2d 853 (5th Cir., 1967), Defendant was convicted by a jury of receiving an automobile in interstate commerce, knowing it to have been stolen. The case was reversed on a testimonial error to which counsel made a timely objection. Sergeant Johnson, one of the arresting officers, when testifying how long he had known the Defendant, replied as follows:

> "I had seen Mr. Odom come in and out of jail and spoke with him for perhaps a year and a half."

The Defendant's attorney moved promptly to strike the above-quoted testimony, and the motion was granted. The Court further admonished the jury not to consider the answer in arriving at their verdict. The Fifth Circuit, in reversing the conviction, made the following comments:

> "The judge's words were at most a mild antiseptic with no prognostic or retrospective assurance that they eliminated the sepsis."

and

"Juries do not facilely forget, and we have the lingering suspicion that the malodorous epithet 'jailhound' may explain the incongruent verdict. The attempt to sanitize testimony by admonition may sometimes succeed, but its success will very often depend upon how virulent the diseased testimony was. Not to reverse this case would violate the clearly articulated principles in Helton v. United States, 5th Cir., (1955), 221 F. 2d 338."

In the Odom case, the inadmissible testimony, "I had seen Mr. Odom come in and out of jail and spoke with him for approximately a year and a half" was to constitute "plain error" and was recognized as a basis for reversal, even in the absence of a request or motion for mistrial.

In the case now before the Supreme Court, the complaint of reference to Kaiser as being a

"con" had much more inflammatory connotation to a layman than does the reference to the comment, "I had seen Mr. Odom come in and out of jail ..." One can be seen going in and out of jail in a number of different capacities: attorney, visitor, employee, under arrest for a minor misdemeanor offense, et cetera. In any event, to one who chooses to draw an inference with criminality it suggests only arrest and does not lead logically to a conclusion of conviction or even to a conclusion of guilt. In Kaiser's case, however, the word "con" as used by the government's witness and as understood by citizens of whatever background and social status, clearly suggests and alerts him to the obvious: that the person referred to by that term had been arrested, tried, convicted and incarcerated in a penitentiary. The term implies more than mere conviction of a crime; it implies that one has been convicted of a

felony offense with its full and final ramifications. The facts and reasoning that led the Court to reverse the conviction of the accused in the Odom case do not appear nearly so compelling for reversal as do the facts in the case now before the Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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